Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1386

ORVAIL SHERMAN,

Petitioner,

v.

AMERICAN FEDERATION OF MUSICIANS, an Unincorporated Association,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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May, 1979

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The respondent American Federation of Musicians of the United States and Canada, AFL-CIO, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case.

QUESTION PRESENTED

In an action that is brought against a labor organization under Section 301 of the Labor Management Relations Act and Section 4 of the Clayton Act, does venue lie in a judicial district which the labor organization has not entered for the purpose of either representing or acting for its members?

STATUTES INVOLVED

All pertinent statutory provisions are referred to in the Petition, starting at page 2 thereof.

STATEMENT OF FACTS

Petitioner Orvail Sherman operated a night club known as Sherman's Palace in Vallejo, California. The club employed musicians as part of the entertainment that it provided to its customers. In October, 1971, Mr. Sherman employed a group of musicians known as the Sandy Knox Show. The group was employed under the terms of a written collective bargaining agreement between the musicians and Sherman's Palace, which provided for arbitration of all disputes arising under that contract.

During the engagement a dispute arose between the parties, resulting in discharge of the band prior to the end of the night club date. Pursuant to the parties' contract, the dispute was submitted to arbitration in the State of California. Petitioner appeared at and participated in the arbitration hearing, which resulted in a finding that $3,600 in unpaid wages was owed to the musicians. Petitioner refused to pay this amount and, to this day, has not paid the wages. Petitioner did not contest the propriety of the arbitration when it was held or at any time prior to the filing of his present lawsuit.

Because the Petitioner refused to satisfy the arbitration award, Local 367 of the AFM [1] (located in Vallejo, California) requested that Orvail Sherman

[1] Respondent American Federation of Musicians of the United States and Canada, AFL-CIO shall be referred to hereinafter as the "AFM."

and Sherman's Palace be placed on the AFM's "defaulters' list". This list is printed in the monthly AFM newspaper ("International Musician"), which is mailed to all AFM members. The purpose of the list is to advise all member musicians that the persons named thereon have been found in arbitration to have defaulted on the payment of wages to musicians. Petitioner continued to operate his business in California after his name was placed on the defaulters' list.

It was not until 1973 that the Petitioner moved to the State of Oklahoma, after he had closed his California night club. In the spring of 1975 his name was removed from the defaulters' list because of the closing of Sherman's Palace. In the fall of 1975, Sherman commenced this lawsuit against the AFM and Locals 375 (Oklahoma City, Oklahoma) and 367 of the AFM, and alleged that the default listing had prevented him from opening a new night club in Oklahoma. Sherman alleged in his complaint that he had incurred nine million dollars in damages.

In response to the complaint, the AFM moved that it be dismissed as a party to the lawsuit in that the District Court did not have *in personam* jurisdiction over the international union and that venue did not properly lie in the Western District of Oklahoma. Before ruling on the motion, the District Court conducted an evidentiary hearing. The court determined that the AFM maintains no office in the State of Oklahoma, has no agent or representative who engages in the representation of employees in the State of Oklahoma, and does not otherwise do business in the State of Oklahoma, so as to confer federal jurisdiction. Based upon these factual findings, the Dis-

trict Court granted the AFM's motion to dismiss, relying, in part, on *Barefoot* v. *International Brotherhood of Teamsters*, 424 F.2d 1001 (10th Cir. 1970), *cert. denied* 400 U.S. 950.[2] The Court of Appeals for the Tenth Circuit affirmed that decision.

REASONS FOR DENYING WRIT

The single question presented is not *whether* the Respondent international union can be sued, but rather *where* it can be sued. Section 301(c) of the Labor Management Relations Act of 1947 (the "LMRA"), codified as 29 U.S.C. Section 185(c), states that a labor organization may be sued only in the district in which the union maintains its principal office and in any district in which its authorized officers or agents "are engaged in representing or acting for employee members." Likewise, Section 4 of the Clayton Act, 15 U.S.C. Section 15, provides that a party-defendant may be sued only in the district in which it "resides, is found, or has an agent".

After a full and complete evidentiary hearing to find jurisdictional facts, the District Court determined that venue did not lie in the Western District of Oklahoma under either Section 301(c) of the LMRA or Section 4 of the Clayton Act. Instead, the court found that the AFM did not maintain its principal office in Oklahoma; that no officer or agent of the AFM had engaged in representing or acting for its employee members in the district; and, further, that the AFM did not reside in, had no office in, and was

[2] Two other defendants, Local 375 (Oklahoma City, Oklahoma) and Local 367 (Vallejo, California) of the AFM, were voluntarily dismissed by plaintiff prior to the Petitioner's appeal to the Court of Appeals for the Tenth Circuit.

not "found" in the Western District. The sole contact which it found between the AFM and the district was a once-yearly visit by an AFM representative who entered the District in order to audit the books of a local union affiliate for the benefit of the AFM, to determine whether the local had complied with its fiscal obligations to the international. Most important, no representative of the AFM ever entered or visited Oklahoma regarding the seminal wage dispute between the Petitioner and members of the AFM.

The Petitioner here contends that the AFM "actively engaged" in representing its members within the District in that it placed his name—at the request of a California Local—on its list of defaulters, and because it regularly includes the defaulters' list in its membership newspaper which it distributes to all AFM members, including those who live and work in the Western District of Oklahoma. The hard fact is that both the District Court and Court of Appeals found that the mailing of a monthly membership newspaper from AFM headquarters in New York City to Oklahoma, without more, did not cause the AFM either to be found in or to be engaged in representing members in the Western District of Oklahoma.

In drafting Section 301(c) of the LMRA and Section 4 of the Clayton Act, Congress intended to impose finite limits on the jurisdiction of the District Courts. Thus, the jurisdictional standards found in the two statutes are far more rigorous than most state long-arm statutes which typically permit suit in a forum against a party defendant who has never entered the state but by its actions outside that jurisdiction has caused an injury to occur within the forum state.

Neither Section 301 of the LMRA nor Section 4 of the Clayton Act expressly create venue in the district in which an injury has allegedly occurred, but instead provide for jurisdiction only in those districts in which the defendant has an office, is found or engages in representation activities.

The Petitioner would have this court reject long-standing case authority in the labor relations arena, *see Barefoot* v. *International Brotherhood of Teamsters, C.W. & H.*, 424 F.2d 1001 (10th Cir. 1970) *cert. denied*, 400 U.S. 950 and *International Union of Operating Engineers* v. *Metropolitan-Gill-Tecon*, 400 F.2d 261 (10th Cir. 1968), and in its stead permit the AFM to be sued "in any of the federal jurisdictions in which . . . [its] activity causes damage or harm." This Court has admonished District Courts that there is a "deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Romero* v. *International Term. Co.*, 358 U.S. 354, 379 (1959). And, when as here, a plaintiff's claim arises under a specific jurisdictional statute the federal courts must "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy* v. *Ratta*, 292 U.S. 263, 270 (1937).

In *Denver & Rio Grande Western Railroad Co.* v. *Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967), this Court stated that under Section 301(c) of the LMRA suits against unions may be maintained only in a district where "the responsible representatives of the union *take concrete action.*" 387 U.S., at 562-563 [emphasis added]. That standard was applied by the District Court and Court of Appeals in this

case. Both courts found under the statutory test requires that they examine "the role actually played by the National Union within the District," and both concluded upon the facts presented that the AFM had not engaged in representing employee members in Oklahoma.[3] Accord, *WHAM* v. *National Post Office Mail Handlers Division*, 99 LRRM 2980 (D.S.C. 1978). See also, *Dixie Carriers, Inc.* v. *National Maritime Union of America*, AFL-CIO, 35 F.R.D. 365, at 369-370 (S.D. Texas, 1964).

The Petitioner attempts to distinguish *Barefoot* because it involved "unofficial and responsive advice from the parent union", while here the listing and mailing by the AFM were "official" acts of the international union. The true significance of *Barefoot* is that venue did not lie in that case in the plaintiffs' forum even though the international union actually gave specific advice to local union officials concerning the labor dispute there at hand, while here there is no evidence at all of any specific contacts between the AFM in New York City and local union officials situate in Oklahoma. Indeed, if the Petitioner's argument that the AFM subjected itself to the jurisdiction of the District Court for the Western District of Oklahoma simply by mailing its monthly membership publication into that district is adopted, every interna-

[3] The Petitioner finds a conflict between the decisions of two District Courts in *Molded Materials Company* v. *International Union of Electrical, Radio and Machine Workers*, 418 F.Supp. 548 (W.D. Pa. 1976), and *F.A. Villalba and Company* v. *The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 413 F.Supp. 94 (W.D. Texas, 1976), and the decision of the Court of Appeals in this case. However, the District Court decisions are inapposite to the sole jurisdictional question that is in dispute here. Both opinions address the vicarious liability of an international union for acts

tional union would become subject to suit in any District Court in the United States under Section 301 of the LMRA and Section 4 of the Clayton Act merely by mailing trade publications nationwide.[4] Surely such all-encompassing susceptibility to suit in any federal district of the United States was not intended by Congress when it drew special venue provisions for the LMRA and the Clayton Act, and would do violence to that intention.

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committed by affiliated local unions and do not concern *where* such bodies can be sued for damages resulting from acts committed by member locals.

[4] Although the Petitioner includes a recitation of Section 4 of the Clayton Act in his reference to pertinent statutory provisions, he fails to argue in his Petition that venue lies against the AFM in the Western District under the federal anti-trust statutes. Assuming that the Petitioner does not intend to abandon that argument, the AFM submits that the facts found by the District Court equally support that court's finding that there was no basis for venue under Section 4 of the Clayton Act. The only possible basis for venue would be that the AFM is "found" in the Western District of Oklahoma. Numerous courts have interpreted that jurisdictional standard when applied to unincorporated associations to require that the party-defendant carry on a "substantial part" of its business activities in the district. *Braun* v. *Berenson*, 432 F.2d 538, at 544 (5th Cir. 1970). *See, In re Chicken Antitrust Litigation*, 407 F.Supp. 1285 (N.D.Ga. 1975). Under the interpretation adopted in *Berenson* and similar cases, the association must be "transacting business" continuously in the forum district for venue to be found.

The business of a labor union is representing employee members. Therefore, in order to find that a labor union is continuously transacting business in a district, it must be actively engaged in its business of representing employees. To that extent the jurisdictional tests of Section 301(c) of the LMRA and Section 4 are coextensive, and venue does not exist in the Western District of Oklahoma upon the facts found by the District Court.

CONCLUSION

For the reasons stated hereinabove, the Petition for a Writ of Certiorari should be denied.

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May, 1979

CERTIFICATE OF SERVICE

I, COSIMO C. ABATO, HEREBY CERTIFY that on this 30th day of May, 1979, three copies of the aforegoing Respondent's Brief in Opposition were mailed by first class mail, postage prepaid, to Steven W. Taylor, Esquire & Gotcher, Gotcher & Taylor, 325 East Parkway, Post Office Box "T", McAlester, Oklahoma 74501, attorneys for Petitioner herein.

Cosimo C. Abato

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